

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2006-0004

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY STEVEN DURHAM REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY “HOLTZMAN
FOR GOVERNOR” AND “IF C WINS YOU LOSE.”**

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon the complaint of Steven Durham that the Holtzman for Governor campaign committee received contributions in violation of Colorado’s political campaign finance laws.

Procedural Background

Mr. Durham filed his complaint with the Secretary of State on March 6, 2006. On March 8, 2006, as required by Colo. Const. art. XXVIII, § 9(2)(a), the Secretary of State referred the complaint to the ALJ for hearing and decision. Hearing was scheduled for March 23, 2006. On March 14, 2006, defendant Holtzman for Governor (the Holtzman Committee) filed a motion to dismiss the complaint for failure to state a claim. To give Mr. Durham an opportunity to respond, and to entertain oral argument upon the motion, the ALJ vacated the March 23rd hearing date. The motion to dismiss was denied March 30, 2006 and the matter was reset for hearing April 25, 26, 27 and May 2, 2006. Closing briefs were submitted May 19, 2006. The parties were both ably represented by counsel. Scott E. Gessler, Esq., Hackstaff Gessler LLC, represented Mr. Durham. Gabriel N. Schwartz, Esq., Law Offices of Sandomire & Schwartz, represented the Holtzman Committee.¹

Arguments of the Parties

Mr. Marc Holtzman, a Republican candidate for governor, prominently appeared in television, radio and mailed advertisements funded by an issue committee known as “If C Wins You Lose.” In each ad (the Anti-C&D ads), Mr. Holtzman personally urged voters to vote against Referenda C&D. Referenda C&D sought to amend Article X, § 20 of the Colorado Constitution (Taxpayer’s Bill of Rights, or TABOR) to permit the government to retain and spend certain tax revenues. The ads ran during September and October 2005, approximately 10 to 11 months before the Republican primary election scheduled for August 2006. Although Mr. Holtzman had already declared his candidacy for governor at the time the ads ran, his candidacy was not mentioned in the

¹ The If C Wins You Lose issue committee was dismissed by stipulation on March 23, 2006 and did not participate in the hearing.

ads.

Mr. Durham claims that although the ads were sponsored and paid for by If C Wins You Lose (the Issue Committee), they were coordinated with or controlled by the Holtzman Committee and were produced for the purpose of increasing Mr. Holtzman's name recognition among Republican primary voters as a tax opponent, purportedly an issue of great interest to those voters. He contends the ads were in essence contributions to the Holtzman Committee and as such exceeded contribution limits imposed by the Colorado Constitution.

The Holtzman Committee denies that it controlled or coordinated production of the ads, or that they were produced for its benefit or on its behalf. It points out that although Mr. Holtzman was a candidate for the Republican nomination for governor at the time the ads ran, the ads did not mention Mr. Holtzman's candidacy nor advocate his election. The Holtzman Committee argues that Mr. Holtzman's appearance in the ads to oppose C&D was protected by his First Amendment right to free speech and cannot be considered an illegal contribution to his campaign.

Issue Presented

The primary source of Colorado law regulating political campaign finance is Article XXVIII of the Colorado Constitution. Article XXVIII, § 3 places stringent limits on the amounts that may be contributed to a candidate or candidate committee. Section 3(1)(a) limits contributions from any person to the committee of a candidate for governor in the primary election to no more than \$500.

Article XXVIII, § 2 provides several definitions of "contribution." Mr. Durham alleges that the ads in question meet three of these definitions, specifically: § 2(5)(a)(II) – "Any payment made to a third party for the benefit of any candidate committee ..."; § 2(5)(a)(IV) – "Anything of value given, directly or indirectly, to a candidate for the purposes of promoting the candidate's nomination ... or election"; and § 2(9) which states that an expenditure that is coordinated or controlled by the candidate or the candidate's agent shall also be considered a contribution.

The issue is whether the Anti-C&D ads are contributions to the Holtzman Committee under any of these definitions.

Findings of Fact

Marc Holtzman

1. During the time relevant to this case, August to November 2005, Mr. Holtzman was a candidate for the Republican nomination for Governor of Colorado.

2. Mr. Holtzman is a lifelong Republican and holds a very conservative philosophy of governance. He is a businessman with a history of conservative politics, including heading President Reagan's anti-tax group (Citizens for America), raising funds for other conservative organizations, and serving as Governor Bill Owens' Secretary of Technology. Consistent with his philosophy and history, Mr. Holtzman is a

staunch opponent of taxes and government spending. Because Referenda C&D proposed to allow the state of Colorado to retain and spend taxes that TABOR would otherwise have required to be refunded to the taxpayers, he believed C&D were “horrible” public policy. Mr. Holtzman was therefore eager to campaign against Referenda C&D.²

3. Referenda C&D were placed before the voters of Colorado at the November 1, 2005 ballot issue election. In the run-up to that election, a number of issue committees were formed to oppose both referenda. Mr. Holtzman chose to use the If C Wins You Lose committee as his platform to oppose C&D.

4. Mr. Holtzman’s anti-tax, anti-spending philosophy was a cornerstone of his campaign for governor.

Holtzman for Governor (the Holtzman Committee)

5. The Holtzman Committee is the official candidate committee established to support Mr. Holtzman’s bid for governor. It was formed in December 2004 as the Holtzman for Governor Exploratory Committee.

6. At all times relevant to this case, Mr. Dick Leggitt was the campaign manager for the Holtzman Committee, and Ms. Laura Teal was its political director.

7. As campaign manager, Mr. Leggitt’s duties included directing day-to-day operations of the Holtzman Committee and developing its campaign strategy.

8. As the candidate, Mr. Holtzman had final decision-making authority for the Holtzman Committee.

If C Wins You Lose (the Issue Committee)

9. The Issue Committee was formed in August 2005 as a Colorado nonprofit corporation. Its stated purpose was “promoting the common good and general welfare of the people of the community.”

10. Representative Joe Stengel, then Minority Leader of the House of Representatives, was the president of the Issue Committee. The Issue Committee had two principal employees, Sam Pimm who was the executive director and Stephen Andrew George who was its field director and administrative assistant.

11. Between August 2005 and November 2005, the Issue Committee sponsored TV, radio and print advertising opposing Referenda C&D. Mr. Holtzman appeared as the primary spokesperson against C&D in most of the Issue Committee’s advertising.

The Anti-C&D Ads

12. The Issue Committee sponsored three types of advertisements featuring Mr. Holtzman as the primary or only spokesman. The first was a TV ad in which Mr.

² Referenda C&D were “ballot issues” as defined by § 1-40-102(1), C.R.S.

Holtzman appeared in a mountainous scene typical of Colorado and said:

I'm Marc Holtzman. Referendum C and D would give the politicians a five billion dollar blank check to increase the size of government, with no guarantee of how the money would be spent. I strongly urge you to vote no on C and D.

The ad opened with brief sound bites from three unidentified "people on the street," followed by Mr. Holtzman who was identified and was clearly featured in the ad. His monologue occupied approximately half of the 30 second ad.

13. The second form of advertisement was a radio ad broadcast on KOA, a statewide radio network. In the ad, Mr. Holtzman says:

Hi, I'm Marc Holtzman. I want to tell you why Referendum C and D are wrong for Colorado. At the end of the day, C and D mean less money in your pocket, and whatever you call it, that's a tax increase. That's the worst choice we can make in our uncertain economy. Higher taxes mean less money for family expenses, like car payments, tuition, and medical bills. There are better solutions, like putting more education dollars into the classroom. The state's tobacco settlement money is shrinking every day. Why not take our 1.4 billion dollar lump sum payment now, as other states have done. And we can find waste in our 15 billion dollar state budget. It's there. These are solutions that can work, and we need to try them instead of raising taxes. I'm Marc Holtzman. I say let's show some real leadership, meet the challenge, and get the job done right. Vote no on referendum C and D.

Mr. Holtzman is the only speaker in the ad.

14. The third type of advertisement was a mail piece (mailer) sent to approximately 240,000 registered Republican voters throughout the state. On one page, the mailer quoted Mr. Holtzman as saying "Referendums C & D are the biggest tax increase in Colorado history. Don't let politicians waste your tax money on their pet projects. Vote 'no' on C & D." Another page featured a photograph of Mr. Holtzman, identified him by name and quoted him as saying:

Referendums C & D give politicians a \$5 million blank check to increase the size of government – with no guarantee on how the money will be spent. Colorado's future prosperity and the financial security of our families depend on defeating the massive tax increases that Referendums C & D will bring. Join me in voting NO on Referendum C & D.

Although Rep. Stengel also appeared in the ad and was quoted, Mr. Holtzman's picture was much larger and his quotes much more extensive than Rep. Stengel's.

15. None of the Anti-C&D ads identify Mr. Holtzman as a gubernatorial candidate, and none of the Anti-C&D ads expressly advocate the election or defeat of Mr. Holtzman or any other candidate.

16. Each of the ads expressly opposed passage of Referenda C&D.

17. The Issue Committee produced other advertising against C&D that did not feature Mr. Holtzman, including a radio advertisement by Rep. Stengel, production of 10,000 yard signs, and some mailings and handouts. However, the evidence does not establish the extent or precise nature of this advertising.

Payments to Third Parties

18. The Issue Committee paid money to third parties to design, produce and distribute the Anti-C&D ads.

19. Goddard and Claussen Strategic Advocacy group (Goddard and Claussen) was the media consultant that produced the TV and radio ads.

20. The Issue Committee paid Goddard and Claussen \$618,652.73 between September 6 and October 13, 2005, which included payments for the design, production and distribution of the Anti-C&D TV and radio ads.³ The record does not establish what portion of this amount was for the ads featuring Mr. Holtzman and what portion was for other advertising.

21. Creative Direct was the mail advertisement consultant that produced the mailed advertisements featuring Mr. Holtzman.

22. The Issue Committee paid Creative Direct \$94,000 on October 18, 2005, which included payments for the design, production and distribution of the mailed Anti-C&D ads. The record does not establish whether this entire amount was for the mailed ads featuring Mr. Holtzman or what portion, if any, may have been spent on other advertising.

Production of the Anti-C&D Ads Was Coordinated or Controlled by the Holtzman Committee

23. There was extensive testimony about the interactions between the Holtzman Committee and the Issue Committee. Though much of the evidence was circumstantial or in dispute, the ALJ finds by a preponderance of the evidence that the Holtzman Committee did exercise a significant degree of coordination and control over the Issue Committee and the production of the Anti-C&D ads. This finding is based upon a number of facts, including the following.

24. The Issue Committee was established at the initiative of the Holtzman Committee campaign manager, Mr. Leggitt.

a. Mr. Leggitt arranged for the Issue Committee to hire Mr. George and Mr. Pimm.

b. Mr. George testified, and the ALJ finds as fact, that Mr. Leggitt hired him in early August 2005 to assist in setting up the Issue Committee's office. Mr. Leggitt told

³ This number is a sum of the total payments to Goddard and Claussen as reported by the Issue Committee to the Secretary of State, less \$31,535.50 in "returned expenditures." Exhibits 14 and 34.

Mr. George that he was setting up an issue committee to defeat C&D, and that Mr. Holtzman would be its primary spokesman. Mr. Leggitt also requested Mr. George to go to the airport to pick up the Issue Committee's executive director, Mr. Pimm, who arrived on August 7, 2005. Mr. Leggitt informed Mr. George that although Mr. Pimm would be his immediate supervisor, Mr. Leggitt planned to remain involved in most Issue Committee decisions.⁴

c. Mr. Pimm was an acquaintance of Mr. Leggitt, and Mr. Leggitt either recommended or selected him to be the Issue Committee's executive director. Phone records show that Mr. Leggitt or others within the Holtzman Committee had more than a dozen phone conversations with Mr. Pimm, beginning August 2, 2005.

d. The Holtzman Committee arranged for the office space used by the Issue Committee. The Holtzman Committee office and the Issue Committee office were located on the same block of Broadway, in Denver. Mr. George picked up the key for the Issue Committee office from the Holtzman Committee.

e. The Holtzman Committee arranged for the utilities used by the Issue Committee. Although the Holtzman Committee may not have actually paid the utility bills, the Excel Energy utility service for the Issue Committee's space was in the Holtzman Committee's name.

f. Mr. Leggitt and the Holtzman Committee made decisions regarding installation of the Issue Committee's phone service.

25. The Holtzman Committee exercised substantial influence over the content of the Anti-C&D ads.

a. Mr. Leggitt recommended to Mr. Pimm that the Issue Committee retain Goddard and Claussen to produce the radio and TV ads. Mr. Holtzman conferred with the president of the Issue Committee, Rep. Stengel, and agreed upon the wording of the Issue Committee's TV ads. Mr. Leggitt reviewed the scripts for both the radio and TV ads and exercised veto power over those scripts. He attended the filming of the TV ads, reviewed draft and final versions of those ads before they were aired, and suggested changes to the draft versions.

b. Boyd Marcus was the Holtzman Committee's campaign consultant and a friend of Mr. Leggitt. The Issue Committee also consulted Boyd Marcus, and retained his firm, Creative Direct, to produce the mailer for the Issue Committee. Mr. Leggitt and Ms. Teal reviewed the mailer before it was sent out.

26. In addition to coordination of the Anti-C&D ads, the following additional facts show a considerable amount of general coordination occurred between the two committees throughout the development and distribution of the Anti-C&D ads.

a. Telephone records of the Issue Committee and its employees George and Pimm, and the telephone records of the Holtzman Committee, show a very large number of telephone calls were made between the two committees during the course of

⁴ Mr. Pimm did not testify at the hearing.

the development and distribution of the Anti-C&D ads. Records show that Issue Committee employees, most likely Mr. Pimm or Mr. George, made over 50 calls to Mr. Leggitt alone. The very first call from the Issue Committee's office, once phones were installed on August 24, 2005, was to Mr. Leggitt.

b. In early August 2005, at about the time Mr. Leggitt spoke to Mr. George about working for the Issue Committee, the Holtzman Committee retained ZPA Solutions, Mr. George's company, to produce a fund raising letter for the Holtzman Committee. Mr. George personally worked on this letter. The Holtzman Committee paid Mr. George's company, ZPA Solutions, rather than Mr. George personally, to avoid disclosing to the Secretary of State that the Holtzman Committee was making payments to an employee of the Issue Committee.⁵

c. In late August 2005, Mr. Leggitt reviewed polling information regarding C&D that was paid for and provided by the Issue Committee.⁶

d. In October 2005, the Holtzman Committee's political director, Ms. Teal, directed the Holtzman Committee's volunteers to assist Mr. George distribute campaign literature for the Issue Committee.

e. Rep. Stengel, the Issue Committee's president, was a supporter of Mr. Holtzman's candidacy for governor and was part of the Holtzman Committee's media strategy committee.⁷

f. At about the same time the Anti-C&D radio ads were being produced and aired, the Holtzman Committee produced a "negative" radio ad criticizing Mr. Holtzman's opponent for the Republican nomination, Bob Beauprez, for his allegedly ambivalent opposition to C&D. It is common campaign strategy to match an ad supporting a candidate or issue with a separate, negative, ad attacking the opponent. The contemporaneous and congruous nature of these two advertisements suggests they were coordinated by the two committees.

g. Following the C&D election, Ms. Teal asked Mr. George to sign a confidentiality agreement on behalf of the Holtzman Committee, even though he was an employee of the Issue Committee and not the Holtzman Committee.

27. Mr. Holtzman conducted substantial fundraising for the Issue Committee and raised a significant portion of the money that was spent to produce the Anti-C&D ads. He made 50 to 100 fundraising calls to potential contributors and arranged donations from a number of individuals, including a \$100,000 donation directly to the Issue Committee from his father's company, JewelCor Management. JewelCor donated

⁵ A Holtzman Committee internal e-mail discussed ways to route the payment "so Andy [George] does not show up on our [expense] report." Exhibit 2, p.1. Mr. George confirmed at the hearing that the intent was to avoid having his name appear on both committees' expense reports.

⁶ Although Mr. George testified that the polling information contained at least one question regarding Mr. Holtzman's name recognition, other witnesses denied this. The poll was not offered as evidence and the ALJ makes no finding of fact as to this issue.

⁷ Though Rep. Stengel denied having this status, Mr. Leggitt testified at his deposition that Mr. Stengel was a member of the media strategy committee.

an additional \$50,000 to an organization known as Americans for Freedom and Opportunity, which in turn donated the money to the Issue Committee. The Issue Committee's first payment of \$73,000 to Goddard and Claussen, the media consultant, was made within five days of the Committee's receipt of JewelCor's \$100,000 donation.

28. In summary, the preponderance of the evidence shows that the Issue Committee's activities, including production of the Anti-C&D ads, were coordinated and controlled by the Holtzman Committee to a significant degree.

The Anti-C&D Ads Were Produced on Behalf of and for the Benefit of the Holtzman Committee, for the Purpose of Promoting Mr. Holtzman's Nomination

29. The fact that Mr. Leggitt and the Holtzman Committee interacted significantly with the Issue Committee suggests, but does not necessarily prove, that the Issue Committee was acting on behalf of the Holtzman Committee. However, the following additional evidence, when considered with the evidence described above shows that the Issue Committee was acting, at least in part, for the benefit of the Holtzman Committee when it produced the Anti-C&D ads.

30. The "Leggitt e-mail."⁸ On November 1, 2005, the date of the ballot issue election, Mr. Leggitt sent an e-mail to a Denver Post reporter claiming that "Marc's principled opposition to [C&D] has helped us dramatically improve his standing among any Republican Primary voters." Mr. Leggitt went on to explain how his candidate's "speaking out" against C&D had boosted his name recognition among GOP primary voters. Mr. Leggitt closed by saying, *"Our strategy from Day One has been simple: Demonstrate Marc's solid anti-tax views to Republican primary voters and move into position to challenge Beauprez, and the party establishment, by the beginning of 2006. By almost any measure, we have accomplished our goals."* (Italics added).

31. Although the Leggitt e-mail did not specifically mention the Anti-C&D ads, most of Mr. Holtzman's advertising in opposition to C&D occurred through the use of the Anti-C&D ads. The ALJ therefore finds that the e-mail's reference to "speaking out" against C&D was a reference to those ads.

32. The Leggitt e-mail is an admission by the Holtzman Committee that it planned Mr. Holtzman's participation in the Anti-C&D ads for the purpose of improving his chances of achieving the Republican Party's gubernatorial nomination.

33. At the hearing, Mr. Leggitt said that his e-mail was just political "spin," and that in reality he had counseled Mr. Holtzman against publicly opposing C&D because it would be harmful to his campaign for governor. His testimony was contradicted by Mr. Holtzman's deposition testimony wherein Mr. Holtzman denied that he and Mr. Leggitt ever discussed the impact his opposition to C&D would have on his campaign. Though Mr. Holtzman testified differently at trial, the ALJ is persuaded by Mr. Holtzman's deposition testimony that Mr. Leggitt did not advise Mr. Holtzman against publicly opposing C&D. The ALJ therefore discounts Mr. Leggitt's hearing testimony and

⁸ Exhibit 3.

concludes that Mr. Holtzman's participation in the Anti-C&D ads was part of the Holtzman Committee's campaign strategy.

34. In hindsight, Mr. Holtzman's opposition to C&D may actually have hurt his campaign (see Finding of Fact # 37). Nevertheless, the preponderance of the evidence shows that the Holtzman Committee intended to use Mr. Holtzman's opposition to C&D to benefit its campaign, and the Anti-C&D ads furthered that goal by publicizing his anti-tax stance to Republican primary voters. That evidence includes the following:

a. It is generally accepted in political circles that Republican voters likely to vote in primary elections generally favor a candidate who takes a strong anti-tax stance.

b. Referenda C&D were generally viewed by their opponents as being the equivalent of a tax increase. Although Republicans were split on the issue, the polls showed that the majority of Republicans in Colorado opposed C&D.

c. A July 30, 2005 Letter to the Editor of the Rocky Mountain News, authored by Mr. Holtzman states, "As a candidate for governor, I will lead the fight to defeat C and D."

d. In August 2005, the Holtzman Committee produced a mailer identifying Mr. Holtzman's opposition to Referenda C&D as his primary campaign issue. The mailer identified Mr. Holtzman as a candidate for governor and quoted the Denver Post as saying "Marc Holtzman has staked out his early position as TABOR's defender-in-chief." Mr. Holtzman is quoted as saying, "As a candidate for Governor, I am leading the fight to defeat C and D."

e. A fund raising letter prepared in August 2005 by the Holtzman Committee and signed by Rep. Stengel, stressed Mr. Holtzman's opposition to C&D as a key reason to support his bid for governor. Rep. Stengel writes, "Because Marc [Holtzman] is a serious candidate, he understands the direct impact Referendum C & D will have on the lives of every day working Coloradans." "Marc states that Referendums C & D are not in the best interests of families and the citizens of Colorado." "Marc is willing to lead." Attached to the letter is a preprinted reply that reads, in part: "Joe, I want to help Marc in his race for Governor, and he can count on my support. Marc – thanks for standing up to a few Colorado Republican Leaders and insuring that Colorado will continue its path of fiscal responsibility."

f. A newspaper story from September 2005 quoted Mr. Leggitt as describing Mr. Holtzman as "the anti-tax, anti-big spending candidate;" and a newspaper story from November 2005 after the passage of Referendum C quoted Mr. Leggitt as saying that due to Mr. Holtzman's opposition to C&D, "we're much stronger than we were three months ago."

g. Mr. Holtzman's campaign promise to "lead the fight" is semantically linked to the wording of the Issue Committee's radio ad, which says, "I'm Marc Holtzman. I say let's show some *real leadership, meet the challenge, and get the job done right*. Vote no on referendum C and D." This call to "follow the leader," when linked with Mr. Holtzman's campaign promise to "lead the fight" against C&D gives the Issue

Committee's radio ad a strong flavor of candidate advocacy. The mailed ad exhorting readers to "join me in voting NO on Referendum C & D" is to similar effect.

h. The Holtzman Committee's campaign strategy squares with Mr. George's testimony that when he was hired by Mr. Leggitt, Mr. Leggitt told him he was setting up the Issue Committee with Mr. Holtzman as the spokesperson in order to benefit Mr. Holtzman's bid for the Republican nomination.

35. Rep. Stengel testified that as the president of the Issue Committee, he was responsible for its actions and its only purpose was to defeat C&D, not support Mr. Holtzman's campaign. Rep. Stengel's statement, however, is undercut by the fact that Mr. Leggitt had already started setting up the Issue Committee several weeks before Rep. Stengel got involved. Rep. Stengel, by his own account, did not become involved in the Issue Committee until August 24, 2005. Prior to that date, Mr. Leggitt had already arranged Mr. Pimm's and Mr. George's employment by the Issue Committee, and had confided in Mr. George the purpose of the Issue Committee. See Findings of Fact # 24.b and 34.h.

36. Although Rep. Stengel sent letters to other potential C&D opponents, including Mr. Beauprez, Mr. Holtzman was already involved with the Issue Committee and had already arranged for the \$100,000 donation from his father. When other potential C&D opponents responded that they would consider joining the Issue Committee's efforts, these offers were not followed up. These facts support the finding that Mr. Holtzman was pre-selected as the Issue Committee's primary spokesman.

37. Mr. Holtzman's vociferous public opposition to C&D was, in fact, not a good campaign strategy. His involvement in the Anti-C&D ads distracted him from his campaign, alienated him from Republican leadership who supported C&D (particularly Governor Owens), and resulted in some loss of financial support to his campaign.

38. Mr. Holtzman testified, and the ALJ finds as true, that he is a "principled conservative" who was committed to defeating C&D regardless of the impact it might have on his campaign. This finding is supported by the testimony of Mr. Durham's expert political consultant, Mr. David Hill, who agreed that it was not good campaign strategy for Mr. Holtzman to publicly oppose C&D. In fact, when Mr. Holtzman was first considering a run for governor, Mr. Hill told him that C&D would likely pass and it would not be good for Mr. Holtzman's campaign to back a losing ballot issue. Mr. Hill also correctly predicted that Mr. Holtzman's opposition to C&D would set him against Governor Owens, who was supporting the ballot issues. Mr. Holtzman, however, persisted in his opposition to C&D despite Mr. Hill's warnings. Thus, although the Holtzman Committee made Mr. Holtzman's anti-tax stance a cornerstone of its campaign strategy, it is also true that Mr. Holtzman was personally committed to defeating C&D regardless of the impact on his campaign.

39. The ads, though produced in part on behalf of the Holtzman Committee, were not produced exclusively for its benefit.

a. Opposition to C&D was not a "sham issue," meaning that the opposition to C&D was not artificially created just to support Mr. Holtzman's campaign. A number of

other groups and a significant portion of the electorate opposed C&D for purposes unrelated to Mr. Holtzman's campaign.

b. Representatives of the Issue Committee frequently met with representatives of other C&D opponent groups to discuss anti-C&D strategy.

c. Mr. Holtzman, Mr. Stengel, and others associated with the Issue Committee were strong C&D opponents. They were motivated to defeat C&D regardless of the benefit the ads might confer on the Holtzman Committee. Therefore, although the Holtzman Committee coordinated the ads to give Mr. Holtzman publicity among Republican primary voters, the ads also had a legitimate purpose to defeat C&D.

The Anti-C&D Ads Had Value to the Holtzman Committee

40. The Anti-C&D ads had some value to the Holtzman Committee because they cost a considerable amount of money to produce and the Holtzman Committee expected them to further Mr. Holtzman's name recognition among Republican primary voters as the "anti-tax, anti-big spending candidate."

41. The record is not sufficient to accurately determine the value received by the Holtzman Committee from the Anti-C&D ads. The ALJ finds persuasive the testimony of the Holtzman Committee's expert pollster and political consultant, Paul Talmey, that the Anti-C&D ads were a poor vehicle to benefit Mr. Holtzman's candidacy for a number of reasons. First, Mr. Talmey agreed with Mr. Hill that it was politically unwise for Mr. Holtzman to publicly oppose C&D if he wanted to run for governor. Second, the ads ran many months before the Republican primary election scheduled for August 2006, and therefore were too early to meaningfully influence the primary election due to the swift decay in effect expected from such ads. Third, the expensive investment in TV and radio advertising was over-kill because, unlike mailed advertisements, those media could not be sent just to Republican primary voters. If the only purpose of the Anti-C&D ads had been to increase Mr. Holtzman's name recognition among those voters, it could have been done at a fraction of the cost.⁹

42. The evidence is not sufficient to determine whether the Anti-C&D ads actually accomplished the goal of increasing Mr. Holtzman's favorable name recognition among GOP primary voters. Although polls incidentally conducted by Denver pollster Lori Weigel in May and October 2005 suggested that Mr. Holtzman's name recognition may have increased over that time, polls designed to track Mr. Holtzman's name recognition among GOP primary voters were not done.¹⁰ In the absence of such tracking polls, it is not possible to know with a reasonable degree of certainty what effect the Anti-C&D ads had on Mr. Holtzman's name recognition among those voters.

43. The Holtzman Committee did not report the Anti-C&D ads to the Secretary of State as a contribution.

⁹ No evidence was offered as to what that cost might be.

¹⁰ Ms. Weigel's polls suggest that although Mr. Holtzman's name recognition may have increased, the percentage of negative impressions also may have increased. However, this is speculation.

Discussion and Conclusions of Law

Colorado's Campaign Finance Laws

The primary campaign finance law in Colorado is Article XXVIII of the Colorado Constitution, which was approved by the people of Colorado in 2002 as Amendment 27 to the constitution. Article XXVIII imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and vests enforcement authority in the Secretary of State. Colorado also has statutory campaign finance law, known as the Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., which was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again revised by initiative in 2002 as the result of passage of Amendment 27. The Secretary of State, pursuant to regulations published at 8 CCR 1505-6, further regulates campaign practices. Most of the provisions relevant to this case are found in Article XXVIII.

Article XXVIII's Regulation of Contributions

Article XXVIII regulates contributions to candidate committees. Gubernatorial candidate committees may accept no more than \$500 in contributions per primary election from any one person, and the committee must disclose all contributions of more than \$20. Colo. Const. art. XXVIII, §§ 3(1)(a) and § 1-45-108, C.R.S., respectively. Violators are subject to significant civil penalties. Colo. Const. art. XXVIII, § 10.

The Definition of a Contribution

Mr. Durham does not allege that the Issue Committee made direct payments of money or gifts of property to the Holtzman Committee, but rather alleges that the money paid to third parties to produce the Anti-C&D ads was an indirect contribution to the Holtzman Committee of over \$500 in value.

The Anti-C&D ads are a "contribution" if they meet one of the four definitions of that term found in § 2(5)(a) of Article XXVIII. Two of those definitions, §§ 2(5)(a)(II) and (IV), relate to payments to third parties:

(5)(a) "Contribution" means:

. . . .

(II) Any payment [of money] to a third party for the benefit of any candidate committee ...;

. . . .

(IV) Anything of value given ... indirectly, to a candidate for the purpose of promoting the candidate's nomination ... or election.

A plain reading of subsections (II) and (IV) suggests that money paid by an issue committee to a media consultant for the purpose of producing ads intended to benefit a candidate committee and to promote the candidate's nomination would be a contribution. However, more is needed to pass muster under the First Amendment.

The Distinction Between Campaign Expenditures and Contributions

In the sentinel case of *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court analyzed in First Amendment terms the restrictions placed upon political campaign expenditures and contributions imposed by the Federal Election Campaign Act of 1971 (FECA).¹¹ In holding that some limitations were constitutional while others were not, the Court explained that expenditures in support of a candidate are subject to greater First Amendment protection from regulation than are contributions to a candidate because limits on expenditures generally curb more expressive and associational activity than do contribution limits. *Id.* at 19-21. Because virtually every means of communicating ideas in today's mass society requires the expenditure of money, limits on expenditures for political speech represent substantial restraint on the quality and diversity of political speech (*Id.* at 19); and "heavily burden core First Amendment expression." *Id.* at 48. "By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20.

The Supreme Court recognized, however, that expenditures by a non-candidate that were "controlled by or coordinated with" the candidate or his campaign committee might well have the same value to the candidate as a direct contribution and would, if left unregulated, encourage evasion of the contribution limits. *Id.* at 46. The Court discounted this risk because FECA separately provided that "*controlled or coordinated expenditures*" were to be treated as contributions subject to the contribution limits. *Id.* at 47. The Court was comfortable that this provision of FECA was adequate to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47.

Thus, although the Supreme Court has routinely struck down restrictions on "independent" expenditures, it has upheld limitations upon expenditures that were coordinated with or controlled by a candidate, provided the limitations were directly related to the government's compelling interest in preventing the appearance of corruption. See *Co. Rep. Camp. Comm. v. Federal Election Comm'n* ("*Colorado I*"), 518 U.S. 604, 617 (1996) (holding that the First Amendment protects independent expenditures by political parties, the Court stated, "the constitutionally significant fact ... is the lack of coordination between the candidate and the source of the expenditure"); *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.* ("*Colorado II*"), 533 U.S. 431 (2001) (holding that a political party's coordination of expenditures with its candidate was functionally equivalent to contributions to that candidate); and *McConnell v. Federal Election Commission*, 540 U.S. 93, 219 (2003) ("Ever since our decision in *Buckley*, it has been settled that expenditures by a noncandidate that are 'controlled by or coordinated with the candidate and his campaign' may be treated as indirect contributions subject to FECA's source and amount limitations.")¹²

¹¹ 86 Stat. 3.

¹² *McConnell* involved a challenge to Congress's attempt, via the Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, to limit the perceived evils of "soft money" and sham issue advocacy.

The Additional Requirement of Coordination or Control

Consistent with *Buckley*, an interpretation of Article XXVIII that limits expenditures for advertisements supporting a candidate or his committee must yield to the First Amendment unless the expenditures have been coordinated with or controlled by the candidate and thus are, in the Supreme Court's words, "disguised contributions." *Buckley*, 424 U.S. at 47.

To assure that subsections (II) and (IV) are not unconstitutionally applied, the ALJ will consider the Anti-C&D ads to be "contributions" to the Holtzman Committee only if it is proven that production of the Anti-C&D ads was coordinated or controlled by the Holtzman Committee.¹³ This requirement is consistent with Article XXVIII, § 5(3) which states that expenditures "on behalf of a candidate for public office that are coordinated with or controlled by the candidate or the candidate's agent ... shall be considered a contribution to the candidate's candidate committee"; and § 2(9) which defines an "independent expenditure" as one that is not controlled by or coordinated with a candidate while providing that expenditures which are controlled or coordinated are to be deemed contributions.¹⁴

Therefore, considering the requirements of §§ 2(5)(a)(II) and (IV) together with the requirement of coordination or control, the ALJ will find a "contribution" in this case if the following elements have been proven:

1. The Issue Committee made payments of money to a third party resulting in the creation of "anything of value" to the Holtzman Committee;
2. The payments were for the benefit of the Holtzman Committee and for the purpose of promoting Mr. Holtzman's nomination for governor; and
3. The production of the Anti-C&D ads was controlled by or coordinated with the Holtzman Committee.

All three elements have been proven by a preponderance of the evidence. The Issue Committee spent money to design, produce and distribute the ads opposing the C&D ballot issues, which provided publicity of value to the Holtzman Campaign. The effort to produce the ads was initiated by and coordinated with the Holtzman Committee with the intention, at least in part, to benefit the Holtzman Committee's effort to achieve Mr. Holtzman's nomination for governor. Therefore, the Anti-C&D ads must be treated as a contribution to the Holtzman Committee.

¹³ An administrative agency may address whether an otherwise constitutional law has been unconstitutionally applied. *Kantara, Inc. v. State*, 991 P.2d 332, 335 (Colo. App. 1999), *citing Horrell v. Department of Administration*, 861 P.2d 1194 (Colo. 1993).

¹⁴ "Expenditure" is defined by § 2(8)(a) as "any purchase, payment ... or gift of money for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question." (*Italics added*). The Holtzman Committee argues that this definition is not applicable to contributions. See *The Holtzman for Governor Exploratory Committee's Closing Argument*, p. 3. Even if it were, the Anti-C&D ads would be an "expenditure" because Referenda C&D were both ballot issues.

First Element - Did the Issue Committee Make Payments to a Third Party Resulting in Creation of Anything of Value to the Holtzman Committee?

The Issue Committee spent money to produce the Anti-C&D ads. Though the evidence does not disclose the exact amount spent to produce the ads in which Mr. Holtzman was featured, it was not inconsequential. Over \$700,000 was paid to the print and media consultants to produce the Issue Committee's advertisements, and the Anti-C&D ads featuring Mr. Holtzman were surely a significant part of the work done by those consultants.¹⁵

The fact that the payments were made to the consultants designing, producing and distributing the advertisements rather than to the Holtzman Committee directly does not defeat their character as contributions to the Holtzman Committee because § 2(5)(a)(II) specifically addresses payments made to third parties, and § 2(5)(a)(IV) specifically includes "indirect" payments.

Although there is substantial evidence that the Anti-C&D ads did not actually benefit Mr. Holtzman's candidacy for governor, the ALJ nonetheless concludes that at the time the ads were produced they were expected to promote Mr. Holtzman's campaign theme of being the anti-tax candidate, and therefore were "of value" to the Holtzman Committee. The Leggitt e-mail stands as an admission by the Holtzman Committee that the Anti-C&D ads were prospectively viewed as valuable to the campaign. Furthermore, the Holtzman Committee's effort to set up the Issue Committee and oversee the ads is circumstantial evidence that the Holtzman Committee felt they would be of value. "If an outside entity or individual makes a coordinated communication, that communication presumably has a value to the political entity it is coordinated with" *Shays v. Federal Election Comm'n*, 337 F.Supp. 2d 28, 63 (D.D.C. 2004), *aff'd* 414 F.3d 78 (D.C. Cir. 2005).

Second Element - Were the Payments for the Benefit of the Holtzman Committee and for the Purpose of Promoting Mr. Holtzman's Nomination for Governor?

The preponderance of the evidence shows that the Anti-C&D ads were intended, at least in significant part, to promote Mr. Holtzman's stance as an anti-tax crusader and thus benefit his bid for the Republican gubernatorial nomination. Mr. Leggitt bluntly admitted, in his e-mail to the Denver Post reporter that, "Our strategy from Day One has been simple: Demonstrate Marc's solid anti-tax views to Republican primary voters and move into position to challenge Beauprez, and the party establishment, by the beginning of 2006." That is exactly what the Anti-C&D ads were intended to do. Support for this conclusion includes the fact that the Issue Committee was created at the initiative of the Holtzman Committee; the Anti-C&D ads were funded in significant

¹⁵ Mr. Durham would also include as a contribution other Issue Committee expenses, such as Mr. Pimm's salary, the cost of the Issue Committee's poll, and donated computers. See *Closing Argument of Steve Durham*, p. 45. However, these items were not charged in Mr. Durham's complaint, which limits his claim to the Issue Committee's payments for the TV, radio and mailer ads. See Complaint ¶¶ 12, 19 and 28, for example. The ALJ declines to address claims not charged.

part by the efforts of Mr. Holtzman; the ads strongly promoted Mr. Holtzman's key campaign issue of being the leader of the anti-tax movement; the ads featured Mr. Holtzman virtually to the exclusion of any other Republican except Rep. Stengel (who was a supporter of Holtzman); and the Holtzman Committee exercised control over the content and appearance of the ads. See Findings of Fact # 23 through 37. All this is convincing proof that the Anti-C&D ads were produced, at least in part, on behalf of the Holtzman Committee, for its benefit, and for the purpose of promoting Mr. Holtzman's candidacy for governor.

*Third Element - Was the Production of the Anti-C&D Ads
Controlled By or Coordinated With the Holtzman Committee?*

There is extensive evidence that the Holtzman Committee in general, and Mr. Leggitt in particular, set up the Issue Committee for the purpose of providing a platform for Mr. Holtzman to demonstrate the "anti-tax, anti-big spending" views that were the cornerstone of the Holtzman Committee's campaign. Mr. Leggitt hired or arranged for the hiring of the Issue Committee's two primary employees; the Holtzman Committee arranged for the Issue Committee's office space and utilities; Mr. Leggitt reviewed the ads before they were distributed; the first phone contact from the Issue Committee once it was set up was to Mr. Leggitt, and thereafter there was a large volume of telephone and face-to-face intercommunication between the two committees. Though much of this evidence is circumstantial, it is corroborated by Mr. Leggitt's e-mail which confirmed that it had been his plan from "day one" to use Mr. Holtzman's opposition to C&D as a tool to curry favor with GOP primary voters. Under the circumstances, the preponderance of the evidence demonstrates coordination and control.

Free Speech Considerations

The Holtzman Committee argues that Mr. Holtzman's and the Issue Committee's constitutional right to free speech prevents characterization of the Anti-C&D ads as illegal contributions. The ALJ disagrees. The ALJ's interpretation of Article XXVIII does not trample either the Issue Committee's or Mr. Holtzman's right to free speech because it does not limit the Issue Committee from making expenditures to convey its message, nor does it prevent Mr. Holtzman from publicizing his views. It simply concludes that where an issue committee funds advertisements *for the purpose of benefiting* a candidate, and where the candidate or his campaign committee *coordinate or control* that expenditure, the ads must be considered a contribution to the candidate's committee. Limitation upon the amount that may be contributed to a candidate or his campaign committee entails only a marginal restriction upon the contributor's ability to engage in free communication. *Buckley*, 424 U.S. at 20.

The Requirement of Express Advocacy

The Holtzman Committee argues that under Colorado law payments to third parties may be considered contributions to a candidate only if they expressly advocate the election or defeat of a clearly identified candidate. The ALJ does not agree.

In 1996, Colorado voters passed the Fair Campaign Practices Act (FCPA) to establish, among other things, contribution limits for statewide elections. By limiting the size of contributions to individual candidates, the voters intended to reduce, if not eliminate, the appearance of corruption in the election process. *Citizens for Responsible Government v. Buckley*, 60 F.Supp. 2d 1066, 1088 (D. Colo. 1999), *rev'd on other grounds*, *Citizens for Responsible Government v. Davidson*, 236 F.3d 1174 (10th Cir. 2000). When the General Assembly liberalized the FCPA in 2000 by increasing contribution limits and eliminating voluntary expenditure limits, the voters responded by passing Amendment 27 to the Colorado Constitution (Article XXVIII) which re-imposed smaller contribution limits, reauthorized voluntary expenditure limits, and imposed additional disclosure requirements. See *Att'y Gen. Opinion* No. 04-1, January 14, 2004. In passing this constitutional amendment, the electorate reiterated its desire for "strong enforcement of campaign finance requirements." Colo. Const. art. XXVIII, § 1. Article XXVIII must be interpreted in light of this mandate.

The plain language of Article XXVIII §§ 2(5)(a)(II) and (IV) does not include a requirement that a payment be for the purpose of expressly advocating the election or defeat a candidate in order to be considered a contribution. The language only requires that the payment be made "for the benefit" of a candidate committee or "for the purpose of promoting" the candidate's nomination. When the language of a constitutional provision is plain and the meaning is clear, it should be interpreted and applied as written. *People v. Johnson*, 77 P.3d 845 (Colo. App. 2003). Courts are not "to suppose or hold the people intended anything different from what the meaning of the language employed imports." *In re Great Outdoors Colorado Trust Fund*, 913 P.2d 533, 550 (Colo. 1996)(Lohr, J., *dissenting and quoting People ex rel. Carlson, Governor v. City Council of Denver*, 60 Colo. 370, 153 P. 690 (1915)). "The intent of a constitutional provision must be determined from its words, and its words are to be understood in the sense they are generally used ... so that every word employed is to be given its plain and obvious meaning, and it must be assumed that the people, in framing and adopting a constitutional provision, read it with the help of common sense, and it will not be presumed that they intended it should contain a hidden meaning." *Carlson*, 60 Colo. at 377. To look beyond the language of the constitution for a different meaning than therein expressed would be to ignore the plain language and by judicial construction frame and adopt a constitutional provision for the people, instead of construing the one they adopted. *People v. Quimby*, 152 Colo. 231, 381 P.2d 275, 281 (1963)(Frantz, CJ, *dissenting*).

Nor is express advocacy of a candidate's election or defeat required by Colorado case law. Although *League of Women Voters v. Davidson*, 23 P.3d 1266 (Colo. App. 2001), cited by the Holtzman Committee, does discuss an express advocacy requirement, it is in the context of "independent" expenditures which are not the issue in this case. The court in *League of Women Voters* was faced with the question of whether an entity that independently advertises in favor of a candidate should be subject to the FCPA's disclosure requirements. The court relied heavily upon *Buckley*, which held that in order to avoid vagueness and overbreadth problems in FECA's disclosure requirements, independent expenditures could be subject to disclosure only if

they were for the purpose of expressly advocating the election or defeat of a candidate.¹⁶ Because *League of Women Voters* did not address the issue of controlled or coordinated expenditures, it did not address the Supreme Court's advice that those types of expenditures could properly be treated as contributions. Contributions are subject to limitation regardless of whether they expressly advocate a candidate's election or defeat. See *Orloski v. Federal Election Commission*, 795 F.2d 156, 167 (D.C. Cir. 1986) ("This definition [express advocacy] is not constitutionally required for those statutory provisions limiting contributions"); and *Federal Election Comm. v. The Christian Coalition*, 52 F. Supp. 2d 45, 87-88 n. 50 (D.C. Cir. 1999), where the court finds "untenable" and "fanciful" the defendant's argument that the express advocacy standard applies to coordinated expenditures.

Furthermore, regulation of issue advocacy (as opposed to *express* advocacy of a candidate's election or defeat) is consistent with recent Supreme Court guidance that, for First Amendment purposes, there is no "rigid barrier between express advocacy and so-called issue advocacy." *McConnell*, 540 U.S. at 193. Although *Buckley* was initially read by some courts to create special protection for issue advocacy, the U.S. Supreme Court rejected that notion in *McConnell*, finding the express advocacy distinction to be "functionally meaningless." *Id.* at 193. *McConnell* squarely "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy." *Id.* at 194.

The ALJ therefore rejects the Holtzman Committee's argument that payments to third parties to benefit a candidate committee may be treated as contributions only if they expressly advocate the candidate's election or his opponent's defeat.¹⁷

The Function of an Issue Committee

The Holtzman Committee also argues that because an Issue Committee, by definition, is a committee formed for the purpose of supporting or opposing any ballot issue or ballot question, it is not capable of making a contribution to a candidate committee. In support, the Holtzman Committee cites *Common Sense Alliance v. Davidson*, 995 P.2d 748 (Colo. 2000), which held that a committee formed to improve participation in the electoral process did not become an issue committee simply because it drafted and supported its own ballot issue - "If we were to hold that an organization may have multiple purposes, we would effectively create a legal fiction in which groups continually dissolve and reform each time the members decide to pursue

¹⁶ In *Citizens for Responsible Govt. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000), the Tenth Circuit struck down provisions of the 2000 FCPA that overbroadly restricted independent expenditures. Citing *Buckley*, the court held that the FCPA provisions could not be constitutionally valid unless they were construed to apply only to express advocacy of the election or defeat of a candidate. *Id.* at 1194. Like *League of Women Voters*, the court was dealing only with provisions restricting independent expenditures not controlled or coordinated expenditures.

¹⁷ The ALJ is also unpersuaded by the Holtzman Committee's argument that Article XXVIII, § 5(4) expressly limits regulation of expenditures to those "made for the purpose of expressly advocating the defeat or election of a candidate." Section 5 requires disclosure of certain independent expenditures. The precise language of § 5(4) limits that disclosure requirement to "*independent* expenditures."

a new task.” *Id.* at 752.

The ALJ is not persuaded that an Issue Committee is incapable of making a contribution to a candidate. *Common Sense Alliance* is inapposite because it interpreted an earlier FCPA provision, not Article XXVIII’s current definition of issue committee which specifically recognizes that an issue committee may form for more than one purpose. “Issue committee” is now defined by Article XXVIII, § 2(10)(a) as any entity that “has a *major* purpose of supporting or opposing any ballot issue or ballot question.” (*Italics added*). There is nothing in this definition to prevent an issue committee from making a contribution to support a candidate.

Furthermore, *Common Sense Alliance* did not say that an issue committee could never make political contributions. In *League of Women Voters, supra*, the court of appeals rejected an argument that a committee formed for a non-political purpose could not subsequently become a political committee by making expenditures to support or oppose a candidate.

While the stated purposes ... of the organization may be one criterion ... they are not conclusive. To so hold would permit regulable conduct to escape regulation merely because the state purposes were misleading, ambiguous, fraudulent or all three. In addition, such a holding would exalt form over substance and would almost entirely eviscerate the Act and make a mockery of a legitimate attempt at campaign finance reform.”

League of Women Voters, 23 P.3d at 1275.

Thus, the Issue Committee was capable of making a contribution to the Holtzman Committee regardless of the Issue Committee’s stated purpose.

Other Defenses

The Holtzman Committee raises several other defenses, including that Mr. Holtzman’s participation in the Anti-C&D ads is excepted from the definition of contribution by § 2(5)(b), and that the Secretary of State’s regulations, 8 CCR 1506-6, ¶ 1.3, state that a contribution does not include an endorsement of a candidate or an issue by any person. These defenses lack merit.

Article XXVIII, § 2(5)(b) excludes from the definition of contribution “services provided without compensation by individuals volunteering their time on behalf of a candidate, candidate committee ... issue committee,” etc. However, it is not Mr. Holtzman’s volunteer service to the Issue Committee that is in question. It is the Issue Committee’s contribution of the Anti-C&D ads to the Holtzman Committee that is of concern. The Issue Committee provided no volunteer service to the Holtzman Committee, therefore the volunteer service rule is inapposite.

Similarly, 8 CCR 1505-6, ¶ 1.3, protects Mr. Holtzman’s right to oppose C&D by ensuring that his opposition is not, in and of itself, considered a contribution to the Issue Committee. The rule does not, however, prevent the ads from being considered a contribution to the Holtzman Committee where they were created with the Holtzman’s

Committee's coordination and control. In other words, it is not Mr. Holtzman's opposition to C&D that creates the contribution, it is the Issue Committee's purchase of those ads, for the benefit and subject to the coordination or control of the Holtzman Committee, that creates the contribution. The regulation does not protect such conduct.

Summary of the Contribution Issue

The Anti-C&D ads were the product of the initiative, funding, direct participation, and coordination and control of Mr. Holtzman and the Holtzman Committee. The Leggitt e-mail and other direct and circumstantial evidence prove that the Anti-C&D ads were purchased by the Issue Committee, at least in part, to benefit the Holtzman Committee by promoting Mr. Holtzman's candidacy for governor. The Anti-C&D ads were therefore contributions to the Holtzman Committee per §§ 2(5)(a)(II), 2(5)(a)(IV), 2(9) and 5(3).

The Contribution Limits of § 3(1)

Having determined that some portion of the Anti-C&D ads must be deemed a contribution to the Holtzman Committee, the ALJ must now decide whether a violation of the Holtzman Committee's contribution limits has occurred.

Section 3(1)(a) states that "no candidate committee shall accept from any one person, aggregate contributions ... in excess of ... five hundred dollars ... to any Governor candidate committee for the primary election." Although the value of the contribution to the Holtzman Committee has not been established, it certainly was at least \$501 given that the ads cost over \$700,000 to produce and that the ads did accomplish the Holtzman Committee's goal of publicizing Mr. Holtzman's anti-C&D stance to Republican primary voters. Therefore, the Holtzman Campaign violated the contribution limit of § 3(1)(a) by accepting a contribution in excess of \$500 from the Issue Committee.

The Disclosure Obligation of § 7 and §1-45-108, C.R.S.

Article XXVIII, § 7 requires a candidate committee to disclose contributions in accordance with the requirements of § 1-45-108, C.R.S. That section, in turn, requires a candidate committee to report to the Secretary of State "contributions received, including the name and address of each person who has contributed twenty dollars or more" Because the value of the Anti-C&D ads as a contribution to the Holtzman Campaign was certainly more than \$20, the Holtzman Campaign should have reported the Anti-C&D ads as a contribution.

Sanction

Section 10(1)

Article XXVIII, §10 describes two types of civil penalties. Section 10(1) states that, "Any person who violates any provision of [Article XXVIII] relating to contribution ... shall be subject to a civil penalty of at least double and up to five times the amount

contributed, *received*, or spent in violation of the applicable provision of this article.” Colo. Const. art. XXVIII, § 10(1) (*Italics added*).

The word, “*received*,” in § 10(1) suggests that in determining the sanction to be imposed upon a recipient of a contribution, it is necessary to know the value of what was received. Although the Issue Committee paid over \$700,000 to design, produce and distribute the Anti-C&D ads, the ads were not exclusively for the benefit of the Holtzman Committee. The Holtzman Committee employed the Anti-C&D ads to further Mr. Holtzman’s candidacy, but Mr. Holtzman, Mr. Stengel and others associated with the Issue Committee were staunch anti-tax advocates who wanted to defeat C&D regardless of the benefit the ads might bestow upon the Holtzman Campaign. This point is underscored by the fact that, according to expert testimony, the Anti-C&D ad campaign was much more expensive than it needed to be if the only intention was to improve Mr. Holtzman’s name recognition among Republican primary voters. Because the ads were dual-purpose, only a portion of the amount spent can fairly be considered a contribution to the Holtzman Campaign. The parties, however, offered no expert testimony or other evidence to establish what portion of the expenditure should be attributed to furthering Mr. Holtzman’s candidacy as opposed to simply defeating C&D. Therefore, the size of that portion is almost entirely speculative.

Furthermore, the evidence does not disclose exactly how much of the \$700,000 was actually spent on the ads in which Mr. Holtzman appeared. Although a substantial portion was no doubt spent for that purpose, the record does not disclose the cost, nature, number or frequency of the other advertisements produced by the Issue Committee. The portion of the \$700,000 spent on the ads featuring Mr. Holtzman is thus conjecture.

A finding cannot be based on speculation or conjecture. See *Ramirez v. Mixsooke*, 907 P.2d 617 (Colo. App. 1994); *Van Schaack v. Van Schaack Holdings, Ltd.*, 856 P.2d 15 (Colo. App. 1992). Furthermore, agency decisions may not be “arbitrary or capricious” or “unsupported by substantial evidence.” Section 24-4-106(7), C.R.S. In the absence of evidence apportioning the cost of the ads, the ALJ cannot guess as to what that amount would be.

Based upon the conclusion that the value of the contribution was over \$500, the ALJ will impose a corresponding civil penalty. In deciding what multiplier to apply, the ALJ is mindful that the application of the campaign finance laws are particularly difficult in cases such as this that involve indirect contributions. Nonetheless, the ALJ is impressed by the evidence of the Holtzman Committee’s strategy from “day one” to use the Anti-C&D ads to benefit its candidate, and by its attempt to conceal Mr. George’s involvement with both committees.¹⁸ The ALJ therefore selects a multiplier of four, resulting in a civil penalty of \$2,004 (\$501 x 4).

Section 10(2)

Section 10(2) provides for a penalty of \$50 per day for each day that a

¹⁸ See Findings of Fact # 26(b) and 30.

contribution required to be reported by § 1-45-108, C.R.S. is late.¹⁹

The payments to design, distribute and produce the Anti-C&D ads were made during the months of September and October 2005. Because 2005 was an off-election year, the contribution report was due by the fifteenth calendar day following the end of the quarter, which would have been January 15, 2006. Section 1-45-108(2)(a)(I)(A), C.R.S. Section 1-45-108(2.3)(a) allows two additional days for electronically filed reports, making the actual due date January 17, 2006. Section 10(2) does not specify the ending date of the penalty, but construing the section most favorably to the defendant, the ALJ will select the date of filing of Mr. Durham's complaint, March 6, 2006, as the ending date of the penalty. The Holtzman Committee's report was thus 48 days late. At \$50/day, the penalty is \$2,400.

The total penalty imposed is \$4,404, representing a civil penalty of \$2,004 for exceeding contribution limits plus \$2,400 for late disclosure of the contribution.

AGENCY DECISION

The Holtzman for Governor campaign committee violated Colorado's political campaigns law by receiving contributions, in the form of TV, radio and mailed ads produced by the If C Wins You Lose issue committee, of a value in excess of the limits specified by section Colo. Const. art. XXVIII, § 3(1)(a). In accordance with Colo. Const. art. XXVIII, §§ 9(2), 10(1) and (2), the Holtzman for Governor committee shall pay a penalty of \$ 4,404.

This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

DONE AND SIGNED

May 31, 2006

ROBERT N. SPENCER
Administrative Law Judge

Digitally recorded in CR #2

Exhibits admitted

For Complainant: 1(b,d,f,g)*, 2-8, 11-18, 20, 23-27, 32*, 33*, 35*, 37*, 38*

For Defendant: A, B, E-L, M*, N, O, P*, Q-S

* Indicates only portion of exhibit admitted, or admitted for limited purpose.

¹⁹ Although § 10(2) contemplates that the penalty shall be imposed by the Secretary of State subject to appeal to the ALJ, § 9(2)(a) permits the ALJ to impose "any appropriate order, sanction, or relief authorized by this article." The ALJ is therefore authorized to directly impose the \$50/day sanction if a violation of the reporting law is found.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Scott E. Gessler, Esq.
Hackstaff Gessler, LLC
1601 Blake Street, Suite 310
Denver, CO 80202

Gabriel N. Schwartz, Esq.
The Law Offices of Sandomire & Schwartz
662 Grant Street
Denver, CO 80203

and

William Hobbs
Secretary of State's Office
1700 Broadway, Suite 250
Denver, CO 80290

on this ____ day of May 2006.

Technician IV